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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

vs.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE AND ROBERT BULLINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED.

1. Whether a temporary, nontenured public school teacher is protected by the First Amendment against nonrenewal of his contract because of disapproval by his departmental and administrative superiors of the emphasis and conduct of his classes, his actions in giving personal counselling to students, and his belittling of other staff members in discussion with students.

2. Whether the decision not to rehire such a teacher, for the aforementioned reasons, imposes upon him a stigma or dis-

ability foreclosing other employment or seriously damaging his standing or associations in his community, so as to require under the Fourteenth Amendment that he be accorded a formal notice and hearing with respect thereto.

STATEMENT OF THE CASE.

Petitioner was employed by Northern Illinois University ("Northern") during two academic years, 1962-63 and 1963-64, as a temporary teacher substituting for two faculty members who were on leaves of absence. [A. 25-39.]* He did not have tenure nor, as a temporary substitute, was he eligible for consideration for tenure. Petitioner's contract expired at the end of the 1963-1964 school year, official notice of such expiration having been given six months prior thereto. [A. 41.]

During the course of his employment at Northern, several undesirable aspects of petitioner's teaching and conduct with students came to the attention of his colleagues and superiors in the Department of Biological Sciences. Three matters in particular were stressed by petitioner at the trial below:

1. Petitioner's emphasis on sex and mental health and corresponding neglect of other topics on the Department syllabus in the survey course petitioner taught in the field of health, a course required for all students.

2. Petitioner's practice of encouraging students to come to him for personal counselling; the unusually large number of students who responded and the fact that petitioner often raised the grades of those who came to see him, by this device encouraging them to do so; and the fact that he discouraged students from using Northern's professional counselling and health services.

* Page references prefixed with "A" refer to the Appendix, and those prefixed with "Supp. A." refer to the Supplemental Appendix, for the Court of Appeals.

3. Petitioner's habit of belittling his colleagues personally and professionally in his classes and in his office while conferring with students.

Though he suggests in his Petition that the respondents had no evidence to support their conclusions, in fact the record at trial discloses numerous instances of their observing his teaching or counselling [A. 157-58, 160, 219, Supp. A. 13-22], of his showing them classroom materials and discussing with them what he was covering in class [A. 215, Supp. A. 28-29], and of other evidentiary bases for their opinions [Supp. A. 6, 31]. The Petition ignores such aspects of the general setting of the case as that one of the respondents shared an office for a year and a half with petitioner. [Supp. A. 27-28.] More importantly, it ignores the fact that the differences between petitioner and his colleagues were not over whether he did engage in the practices objected to, but over the propriety and desirability of such practices. There was ample evidence at trial from his own and others' testimony that he himself admitted and even boasted about his conduct. Petitioner testified, for example, that in response to the Department Chairman's complaint about his distortion of course emphasis, he told the Chairman he would "emphasize sex education and mental health" and only "touch on all the other subjects." [A. 77.] He testified that he "had large numbers of students come to me for counselling" [Supp. A. 4]; that he used a "shock technique" in teaching about such matters as childbirth and venereal disease [A. 80-81]; that his discussion of venereal diseases "stirred up apprehensions in the minds of most students" [Supp. A. 5]; and that he told the Department Chairman he would continue criticizing other staff, not to them personally or to the administration, but "where I think it is effective, and if it costs me, so be it." [A. 82.]

Petitioner was given written warning when hired for the second year that he was not to continue the objectionable practices [A. 35] and thereafter he had conferences on the subject with his Department Chairman and Dean in which he

defended his actions and declined to discontinue them. [A. 73-82.] The Chairman and the Dean, in consultation with the Provost, determined that in view of this refusal to comply, petitioner should not be scheduled for classes during the final semester before expiration of his contract. [A. 294-95.] This decision was announced to petitioner during the break between semesters and he again availed himself on a number of occasions of opportunities given to present oral and written justification for his conduct, to the Department Chairman and senior members of the Department [A. 256-58], the Dean [A. 295-304], the Provost [A. 181-82] and eventually the President of Northern [A. 282-90]. His salary, office space and other perquisites as a faculty member were continued until his contract expired.

It should be noted that, of the persons named as respondents in the Petition, only six are properly so named. Dr. George Terwilliger, the Chairman of the Department and the man who made the decision not to rehire petitioner, was never served and was dismissed as a defendant prior to trial. [A. x.] Dr. Robert G. Whitesel, an administrator involved in the hiring of petitioner, was also dismissed for nonservice prior to trial. [A. x.] Dr. Bruce Von Zellen, a member of the Department, was named in the Amended Complaint as having been involved in various conspiracies against petitioner, but was dismissed at the close of petitioner's case at trial for lack of evidence. [A. x.] No appeal was taken from any of these dismissals [A. 57] and these parties are not properly respondents in this matter.

The six proper respondents, and their positions at Northern when the cause of action arose, are Dr. Holmes, Northern's President; Dr. Geigle, the Provost; Dr. Skok, the Dean; and Drs. Bullington, Feyerherm and Rohde, the senior members of the Department of Biological Sciences.

ARGUMENT.

Respondents respectfully submit that a writ of certiorari should not be issued in this case. The decision below was clearly within the limits of the holdings as to teachers' rights by this Court in *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and other recent cases, and in applying such holdings does not conflict with decisions of other Circuits or State courts. Petitioner's argument depends generally upon allegations of fact that were contested or unsupported at trial and ignores the existence of a jury verdict which makes such statements unavailable for consideration on review in this Court. The parts of petitioner's argument concerning his being removed from teaching raise issues not presented or preserved below. The issue of whether petitioner had a right to a hearing under the Fourteenth Amendment is not squarely presented to the Court, since the jury in fact was instructed that petitioner had a right to a hearing.

I. The Case Presents No First Amendment Issue.

Petitioner claims that in not being rehired and in not being scheduled for classes during his last semester, he was penalized for exercise of his First Amendment rights. The only First Amendment instruction submitted by petitioner was one to the effect that a public school teacher has a First Amendment right to teach and say anything he wishes in classes and to students as long as he does not make statements knowing them to be false or with reckless disregard of their truth or falsity. [A. 48.] What this instruction really amounts to is a claim that the right to teach itself is a First Amendment right. Such a claim was rejected expressly in *Board of Regents* v. *Roth*, 408 U. S. 564, 575 n.14.

As the Court below noted [Petition, 5a], this instruction ignores the recognition given in cases like *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), to the interests of an educational institution in quality education and faculty harmony. *Pickering*, which involved a teacher's right to present in the public press his views on a school tax referendum, accorded First Amendment protection to speech on matters of "public concern" or interests of a teacher "as a citizen". 391 U. S. at 568. In contrast, petitioner's differences with his colleagues involved professional judgments on course contents and a teacher's role in counselling students. There is nothing in any of this Court's First Amendment holdings that permits a teacher to ignore the judgment of his superiors and fellow faculty members on purely intramural scholastic questions of this sort. Academic freedom is a two-way street in which professors and administrators like the respondents have First Amendment rights to make judgments on academic matters. The interests of the community and of education are best served by leaving professional judgments to professional discretion.

Petitioner's denigration of Northern's administration and faculty—even if dignified with the title of criticism—was not protected by the First Amendment either. Considerations of the time, place and nature of criticism are important to a determination of its First Amendment status. *Healy* v. *James*, 408 U. S. 169, 192-93 (1972); *Pickering* v. *Board of Education*, 391 U. S. 563, 569-70 (1968). Petitioner's remarks, as the Court below stated, were "irresponsibly made . . . to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations." [Petition, 6a.] It was not the kind of "public criticism of . . . superiors on matters of public concern" that this Court has said constitutes protected criticism. *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972). The respondents could not have entered petitioner's classes to debate him in defense of their views without obvious damage to the educational process and necessary institutional harmony. Petitioner's interest in free speech was therefore

clearly outweighed by that of the respondents in maintaining discipline and harmony among faculty and preventing disruption of classroom education. Accordingly, the Trial Court properly refused Petitioner's instruction and determined that there was no First Amendment question appropriate for consideration by the jury.

Petitioner raises the First Amendment issue in two contexts: that of the decision not to rehire him and that of the decision not to schedule him for classes during his final semester. The latter question is not properly before this Court. Removal from teaching was not an issue raised in petitioner's Amended Complaint [A. 1-10] nor was it among the issues stipulated for trial or raised in any proffered instruction. Accordingly, it may not be considered on certiorari. *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917).

II. The Case Presents No Due Process Issue.

The case was tried prior to the decisions of this Court as to the procedural rights of nontenured teachers in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 (1972). These cases held that, except in certain special situations, a nontenured teacher is not deprived of his Fourteenth Amendment rights to liberty or property by a university's failure to give him notice and a hearing in connection with a decision not to rehire him. The special exceptions to this rule which were referred to in *Roth* and are asserted by petitioner to apply in his case are (1) where a university made some charges against a teacher "that might seriously damage his standing and associations in his community," and (2) where a university, in declining to rehire a teacher, "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U. S. at 573.

Petitioner argues that he is within these exceptions because the disapproval of his teaching and counselling imposed a dis-

ability to future employment and damaged his standing a
teacher. This is an argument advanced for the first time
his Petition, and it is therefore not surprising that the recor
devoid of any actual attempt to show damage of this nat
or indeed of any evidence that the respondents or anyone
at Northern ever referred to their problems with petitioner
the community or elsewhere where he might have been harm
Petitioner must depend, then, simply on inference. But the
ferences of damage to be drawn from differences of opin
as to the desirability of an undisputed course of professio
conduct are very different from those to be drawn from
examples of damaging charges given by this Court in *Ro*
The opinion in *Roth* speaks of charges of "dishonesty" or "i
morality" which a hearing is necessary to give a teacher
opportunity to "refute". 408 U. S. at 573. It is thinking in ter
of charges concerning a person's character, and charges mo
over based on facts which may be proven false. In this c
the questions regarding petitioner's conduct were profession
not personal, questions of judgment, not truth. These
simply not the sort of matters that are amenable to soluti
through the processes of notice and hearing.

As to disabilities to other employment, this Court in *Ro*
stated that some proof beyond the mere inference that
teacher's "record of nonretention in one job, taken alone, mig
make him somewhat less attractive to some other employers .
[is necessary to] establish the kind of foreclosure of opportu
ties amounting to a deprivation of 'liberty'," 408 U. S. at 5
n. 13. The absence of even prima facie proof of any such for
closure of other employment opportunities caused the tri
court to direct a verdict for respondents, sustained on appe
with respect to petitioner's allegation that the respondents h
conspired to deny him other employment. [Petition, 8a-9a.]

The petitioner argues that even if his disagreements wi
his colleagues did not in themselves impose a stigma or di

ability, the fact that he was not scheduled for classes did so. Questionable as this argument is simply as a matter of fact, it would in effect give constitutional status to questions of internal university practices in areas such as class scheduling, course assignments and promotions. There is no precedent in the decisions of this Court for such a view and it would infringe seriously upon the academic freedom necessary for professors and administrators to run internal university affairs.

In any case, the Fourteenth Amendment question is not squarely presented in this case since the trial court, acting prior to the *Roth* and *Sindermann* decisions, in fact instructed the jury on the basis that petitioner was entitled to "a reasonable statement of the . . . charges against him" and "a reasonable opportunity to answer or respond or rebut them." [A. 356.] To get around this barrier, petitioner argues that this instruction did not satisfy the hearing requirements envisioned by *Roth* and *Sindermann* because it did not specify that any hearing must be "before any action was taken against him." [Petition, 23.] Yet what the cases cited in *Roth* on the hearing question actually say is that except "where some valid governmental interest is at stake" a Fourteenth Amendment hearing must be before "termination becomes effective." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971); *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). The issue at trial in this case was whether certain meetings and discussions satisfied hearing requirements. There was no contention by either side, however, that any of these meetings and discussions occurred after the effectiveness of the expiration of petitioner's contract. Thus, an instruction on this point was unnecessary.

If a hearing had been required in connection with the decision not to schedule petitioner for classes, the issue of timing might have been material, though even here there was evidence of a meeting prior to the effectiveness of the decision. [A. 256-58.] Again, however, as pointed out above, there is no suggestion in any holding of this Court that the Fourteenth

Amendment requires notice or hearing in connection with a decision as to scheduling or other matters short of termination. Moreover, due process in this connection was not an issue in the Amended Complaint, trial stipulation or proffered instructions and is for this reason beyond review here.

CONCLUSION.

The decision of the Court of Appeals is not in conflict with previous decisions of this Court, nor did it introduce any new rule of law limiting the rights of teachers. Moreover, this case does not squarely present the Fourteenth Amendment issue that petitioner seeks to have reviewed. Therefore the respondents respectively submit that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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